



January 24, 2002

Ms. Paula A. Jones
General Counsel
Employee Retirement System of Texas
Post Office Box 13207
Austin, Texas 78711-3207

OR2002-0346

Dear Ms. Jones:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 157710.

The Employee Retirement System of Texas (the "system") received a request for the requestor's file. You state that most of the requested information has been released to the requestor. You claim, however, that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, and 552.111 of the Government Code, Rule 503 of the Texas Rules of Evidence, and Rule 192.5 of the Texas Rules of Civil Procedure. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that, pursuant to section 552.301(b) of the Government Code, a governmental body must ask for a decision and state the exceptions that apply not later than the tenth business-day after the date of receiving the written request. The system received the present request on October 31, 2001. You did not, however, assert sections 552.103, 552.107, 552.108, and 552.111 as exceptions to disclosure until November 20, 2001, which was more than ten business-days after the system's receipt of the present request. Therefore, we find that the system has waived sections 552.103, 552.107, and 552.111. *See Gov't Code §§ 552.301, .302; Open Records Decision No. 663 at 5 (1999).* Thus, the system may not withhold the submitted information under sections 552.103, 552.107, or 552.111.

Section 552.108 of the Government Code can be invoked beyond the ten-business-day deadline, but only based on the need of another governmental body to withhold the information under section 552.108. *See Open Records Decision No. 586 (1991)* (need of another governmental body to withhold requested information may provide compelling

reason for nondisclosure under section 552.108). You state that as a result of certain statements and actions by the requestor, you contacted the Department of Public Safety (the "department") and requested that it investigate the requestor. You state, however, that this investigation has been closed. Further, while you have submitted an affidavit from the department, this affidavit does not indicate that the department wishes to withhold the information regarding this case. Therefore, we conclude that the system may not withhold the submitted information under section 552.108.

Next, you contend that the some of the submitted information contains confidential attorney-client communications that are excepted from disclosure under section 552.101 of the Government Code in conjunction with Rule 503 of the Texas Rules of Evidence. This office has found that discovery and evidentiary rules are not confidentiality provisions for the purposes of section 552.101.¹ See Open Records Decision Nos. 575 (1990), 416 (1984). We acknowledge that the Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). The submitted documents, however, do not fall into the categories of information in section 552.022. Because the submitted information does not fall into a section 552.022 category, we conclude that the submitted information may not be withheld on the basis of Rule 503 of the Texas Rules of Evidence.

Finally, you argue that some of the submitted information is excepted as attorney work product under section 552.101 in conjunction with Rule 192.5 of the Texas Rules of Civil Procedure.² Again, we note that the submitted documents do not fall into the categories of information in section 552.022. Therefore, we conclude that the submitted information may not be withheld on the basis of Rule 192.5 of the Texas Rules of Civil Procedure.

¹We note that in Open Records Decision No. 574 (1990), this office determined that the statutory predecessor to section 552.107(1) is the appropriate section for a governmental body to cite when seeking to except from required public disclosure communications between the governmental body and its legal counsel. As discussed above, by failing to assert section 552.107 as an exception to disclosure within ten business-days of the system's receipt of the present request, the system waived this exception. See Open Records Decision No. 664 at 5 (1999).

²We note that in Open Records Decision No. 647 (1996), this office determined that sections 552.103 and 552.111 are the appropriate sections for a governmental body to cite when seeking to except attorney work product from required public disclosure. As discussed above, by failing to assert sections 552.103 and 552.111 as exceptions to disclosure within ten business-days of the system's receipt of the present request, the system waived these exceptions. See Open Records Decision No. 664 at 5 (1999).

As we are unable to conclude that the submitted information may be withheld under any of your claimed exceptions, the system must release the submitted information to the requestor.³

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

³Some of the submitted documents contain or consist of confidential information that is not subject to release to the general public. See Gov't Code § 552.023. However, the requestor in this instance has a special right of access to the information. Gov't Code § 552.023. Because some of the information is confidential with respect to the general public, if the system receives a further request for this information from an individual other than the requestor or his authorized representative, the system should again seek our decision.

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, reading "Karen A. Eckerle".

Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 157710

Enc: Submitted documents

c: Mr. Juan Lozano
2142 Rawhide
San Antonio, Texas 78227
(w/o enclosures)